IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05/11/2003

CORAM

THE HONOURABLE MR.JUSTICE N.DHINAKAR
AND
THE HONOURABLE MR.JUSTICE A.KULASEKARAN

O.S.A.No.228 of 1998

Dr.Shantha .. Appellant

-Vs-

Sharada .. Respondent

Prayer:- Appeal filed under Clause 15 of the Letters Patent read with under order 36 Rule 1 of O.S.Rules against the order of this Court dated 24.08.98 passed in T.O.S.No.20 of 1987.

!For Appellant : Mr.R.Krishnaswamy
for Mr.C.Ramesh

^For Respondent : Mr.V.S.Subramanian

:J U D G M E N T

(Judgment of the Court was delivered by N.DHINAKAR, J.)

P.Sundaramurthy died on 6.1.1981 leaving behind him a legal battle to be fought by his two daughters, Shantha and Saradha, over a Will dated 6.12.1980 and also a son by name Shankaramurthy and wife Virudambal Ammal alias Babu Ammal. The respondent in this appeal, Saradha, filed an Original Petition seeking for grant of Probate of the Will. Shantha, the appellant in this appeal, resisted the prayer and thereafter, it was converted as a plaint and numbered as T.O.S.No.20 of 1987. On the side of the respondent/ plaintiff, three witnesses were examined. The plaintiff examined herself as P.W.1 and also examined the doctor, P.W.2 as well as P.W.3, an attesting witness to Ex.P.1, the will. On the side of the appellant/defendant, she examined herself as D.W.1 as well as her husband as D.W.4. Two other witnesses were examined as D.Ws.2 and 3. The contention of the appellant/defendant before the learned Single Judge in T.O.S.No.20 of 1987 is that in view of the suspicious features surrounding the will, the probate should not be granted. According to her, the other legal heirs have been disinherited by Ex.P.1 and that the evidence of P.W.3 as regards the place of

execution of the will is contradictory to his earlier statement made in the affidavit filed in support of Original Petition and that the signature found in Ex.P.1 is not the usual signature of the testator. The learned Judge, rejecting the contentions of the defendant, allowed T.O.S.No.20 of 1987 and granted the probate of the will. Aggrieved by the said order of the learned Single Judge, the present O.S.A. is filed by the defendant.

2. Mr.R.Krishnaswamy, the learned Senior Counsel appearing for the appellant/defendant contends before us that in view of the suspicious features surrounding the will, the learned Single Judge has erred in allowing T.O.S.No.20 of 1987 and ought not to have permitted the probate of the will. It is his submission that the signature found in Ex.P.1, the will, is not the usual signature of the testator P. Sundaramurthy, as could be seen from Exs.P.5 and P.13, wherein he has signed as P.S.Murthy. It is his further submission that there is no satisfactory evidence as to where the will was executed, in view of the contradiction found between the statement made by P.W.3 in the affidavit and the evidence given by him in Court, since, according to the learned counsel, in the affidavit filed, which was earlier in point of time, he had come out with a version that the will was executed at the house, whereas later, in Court, he came out with a version that it was executed at the bank in the presence of Pitchai, another attesting witness. The learned counsel also submits that there is no reason mentioned in the will as to why the testator has decided to disinherit the other two legal heirs and it is also a circumstance, which creates a suspicion about Ex.P.1 and therefore, the O.S.A. is to be allowed.

3. Per contra, Mr.V.S.Subramanian, the learned counsel appearing for the respondent/plaintiff, submits that the evidence on record discloses that there is no material to indicate that the will was not executed by the testator, Sundaramurthy and the contradiction in the statement made by P.W.3 and his evidence is not material enough to discredit his evidence. It is his further submission that disinheritance, by itself, cannot be a reason to reject the will.

4. We have considered the contentions of the rival parties and before we proceed to take up the contentions raised by the parties, we will have a bird's-eye view of the decisions regarding the factors to be considered before a Will is accepted as genuine.

5. In H.VENKATACHALA IYENGAR vs. B.N.THIMMAJAMMA (A.I.R. 1959 SUPREME COURT 443), it was held by the Supreme Court that if there are suspicious circumstances surrounding the will like the shaky signature and doubtful evidence in support of the propounder's case, the condition of the testator's mind at the time of execution of the will, the depositions made in the will being unnatural, improbable or unfair in the light of relevant circumstances, the Court should expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy and unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last will of the

testator and that it is true that if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas, circumstances may raise a doubt as to whether the testator was acting on his own free will in executing the will and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter. The Supreme Court went on to add that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence.

6. The above view expressed by the Supreme Court was, later, reiterated in RANI PURNIMA DEBI AND ANOTHER vs. KUMAR NARAYAN DEB AND ANOTHER (A.I.R. 1962 SUPREME COURT 567). The Supreme Court, in the said judgment, referring to the earlier judgment rendered in A.I.R. 1959 Supreme Court 443 (cited supra), stated that the mode of proving a will did not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act. The Supreme Court went on to add that where, however, if there are suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the will could be accepted as genuine and where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. In RAM PIARI vs. BHAGWANT AND OTHERS (A.I.R. 1990 SUPREME COURT 1742), it was held by the Supreme Court that even though it cannot be said to be hard and fast rule, yet when disinheritance is amongst heirs of equal degree and no reason for exclusion is disclosed, then the standard of scrutiny is not the same and if the Courts below failed to be alive to it, as is clear from their orders, then their orders cannot be said to be beyond review.

7. In GURO (SMT) vs. ATMA SINGH AND OTHERS [(1992) 2 SUPREME COURT CASES 507], the Supreme Court held that with regard to proof of a will, the law is well settled that the mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement prescribed in the case of a will by Section 63 of the Indian Succession Act and the onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and signature of the testator as required by law is sufficient to discharge the onus. The Supreme Court further held that where, however, there are suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the will could be accepted as genuine and such suspicious circumstances may be a shaky signature, a feeble mind and unfair and unjust disposal of property or the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit. The presence of suspicious circumstances, according to the Supreme Court, makes the initial onus heavier and the propounder must remove all legitimate suspicion before the document can be accepted as the last will of the testator. The proposition of law as laid down by the Supreme Court in the above judgments were, later, reiterated in BHAGWAN KAUR vs. KARTAR KAUR AND OTHERS [(1994) 5 SUPREME COURT CASES 135],

GURDIAL KAUR & ORS. vs. KARTAR KAUR & ORS. (1998-2-L.W. 134) and N.KAMALAM (DEAD) AND ANR. vs. AYYASAMY AND ANR. (2002-1-L.W. 460). A Division Bench of this Court in THANKAM ALIAS KARTHIYANI vs. C.MADHAVAN AND ANOTHER (1999 M.L.J. 634), held that mere fact of registration is insufficient to hold that the will is genuine, especially if there are suspicious circumstances.

8. Decision of the Supreme Court as well as decision of this Court referred to above, therefore, show that mode of proving the Will did not ordinarily differ from that of proving any other document except as to the special requirement of att escribed in the case of a Will by section 63 of the Indian Succession Act and if there are suspicious circumstances, the onus should be on the propounder to explain them to the satisfaction of the Court before the Will could be accepted as genuine. The shaky signature, feeble mind and unfair and unjust disposal of property or propounder himself taking a leading part in making of the Will under which he receives substantial benefits are illustrative examples of some of the suspicious features. There may also be other suspicious features and therefore, the above examples are only illustrative in nature and not exhaustive. We will now consider the rival contentions to find out whether there are any suspicious circumstances surrounding the will so as to disallow the respondent/plaintiff from inheriting the property as per the will dated 6 .12.1980, which is marked as Ex.P.1.

9. We will now take up the first contention of the learned counsel that the signature found in Ex.P.1 is not the usual signature of the testator. According to the learned counsel, as we stated earlier, the testator, P.Sundaramurthy, used to sign as P.S.Murthy and no document was produced before the Court to indicate that he used to sign as P.Sundaramurthy, whereas in Ex.P.1, the will, it is seen signed as P.Sundaramurthy. According to him, the signature, P.Sundarmurthy, therefore, is an unusual signature and it is a suspicious circumstance. In support of his plea, he relies upon the two documents, Exs.P.5 and P.13. Ex.P.5 is a letter dated 15.11.1957 addressed to the respondent/plaintiff and Ex.P.13 is a greeting sent by him on 25th December, 1978. We have perused both the documents. On going through the documents, it could be seen that the two letters were addressed to his daughter and the testator, Sundaramurthy, therefore, would have signed them as P.S.Murthy instead of putting his complete signature as P. Sundaramurthy. The two documents are personal documents, one, a letter addressed to the daughter enquiring about her health and other details and the other, a greeting sent by him and there was no need for Sundaramurthy to have put his full signature in the two documents. In this connection, we cannot but refer to Ex.P.18, the case sheet. At the hospital, he was asked to give his consent for an operation and after giving his consent for an operation under general anaesthesia, he has affixed his signature as P.Sundaramurthy. This shows that whenever an official document was signed, the testator was putting his full signature and whenever he addressed private letters to his daughters and others, he was not putting the full signature. It is not the case of the appellant/defendant that the signature found in Ex.P.1 is a forged signature. In fact, even in the written statement of the appellant/defendant, he did not make any allegation that the signature found in Ex.P.1 is a forged signature

and the only statement made therein is to the effect that the signature found in the will is not his "usual signature". In the absence of any allegation that the signature found in Ex.P.1 is not that of P.Sundaramurthy and in view of our above discussion, we are unable to hold that the full signature of P. Sundaramurthy found in Ex.P.1 is a suspicious circumstance leading to a presumption that Ex.P.1 is not a genuine document.

10. The second contention of the learned counsel is that the testator of the will has disinherited two of his legal heirs and that therefore, it is a suspicious circumstance. As we stated earlier, the learned counsel vehemently contends before us that since in the said will he has not mentioned any reason for disinheriting two of his legal heirs and gave the entire property to the respondent/ plaintiff, it is to be treated as a suspicious circumstance. Even at the outset, we may say that we are unable to accept the said contention of the learned counsel. At this stage, an useful reference can be made to the judgment of the Supreme Court in PPK GOPALAN NAMBIAR vs. PPK BALAKRISHNAN NAMBIAR AND OTHERS (A.I.R. 1995 SUPREME COURT 1852), wherein the Supreme Court has held that whole of estate given to son in exclusion of daughter is not sufficient to generate suspicion about the genuineness of the will. The said view was, later, reiterated in SADASIVAM vs. K.DORAISAMY [(1996) 8 SUPREME COURT CASES 624), wherein the Supreme Court has held that divesting of close relations being the purpose of execution of Will, this is normally not a suspicious circumstance and that apart, good reason existed for bequeathing the property to the respondent - the same being his having been brought up by Karuppanna. The Supreme Court in S.SUNDARESA PAI AND OTHERS vs. SUMANGALA T.PAI (MRS.) AND ANOTHER [(2002) 1 SUPREME COURT CASES 630] has held that uneven distribution of assets amongst children, by itself, cannot be taken as a circumstance causing suspicion surrounding the execution of the will. Therefore, the purpose of the will itself is to bequeath the property to a particular person and disinheritance of one or the other legal heir, by itself, cannot be a suspicious circumstance. In the light of the above judgments, we have perused the will, Ex.P.1 and considered the recitals found therein. In the said will, the testator has stated that his son has received necessary education and he is well equipped with the educational qualification and is employed and that he has married without his consent and has chosen to lead his own life. In the said will, while referring to the appellant/defendant, he has stated that she is well placed in life and that she has no issue either male or female and while referring to the plaintiff/respondent, has stated that she has been caring and looking after him and his wife with love and affection in their old age and therefore, she is entitled to the property after the life time of his wife, Babu Ammal. Therefore, the recitals in Ex.P.1 show that the testator had taken into consideration several aspects and then, decided to create life estate for his wife and then, absolute right to the daughter, Sarada, the respondent/plaintiff. This shows that while he executed the will, he was in proper mental frame of mind. The fact that in the said will, after the words Sow.Sarada, letters "W/o. Ikram" found written in ink is, by itself, no reason to say that the will is not a genuine one. It is to be remembered that the will was executed on 6th of December, 1980 and was registered on the same day. We, therefore, reject the second contention also.

11. Now, coming to the last contention of the learned counsel that there is a discrepancy between the statement made by P.W.3 in the affidavit and the evidence given by him in Court as to the place where the will was executed, we cannot but say that the discrepancy is not so vital as to affect the genuineness of the will. It is, no doubt, true that in the affidavit, P.W.3 has stated that the will was executed in the house and in Court, he has stated that it was executed at the bank, where he was employed, in the presence of Pitchai. We have perused the affidavit and it shows that it is nothing but a copy of Form 56 of the Original Side Rules. Para 2 of the said Form is on the following terms:-

"2. That on the day of I was present together with at the house of and we did then and there see the said deceased set and subscribe his name at foot of the testamentary paper in the
language and character hereunto annexed and marked with the letter and declare and publish the same as and for his last will and testament."

When we compare this with the affidavit of P.W.3, the attesting witness, it could be seen that the blanks in the Form have been simply filled and filed in Court like the date, the month, the name of the other attesting witness, the language and the capital word 'A'. This could be due to inadvertence at the time of filing of the petition. In this background, when we consider the evidence of P.W.3, it is clear that the document has been executed at the bank in his cabin. He has specifically stated in chief examination that Sundaramurthy signed the document, Ex.P.1, in his presence and in the presence of Pitchai and that Sundaramurthy requested them to attest the document. He has also stated that he has affixed the office seal on Ex.P.1. A perusal of Ex.P.1 also shows that it contains the office seal of the bank, which shows that the document has been executed at the bank on the relevant date or otherwise, the seal of the bank could not have been affixed on that date, more so, when the said document was registered on the very same day.

12. The above view of ours is strengthened by the observations of the Supreme Court in PPK GOPALAN NAMBIAR vs. PPK BALAKRISHNAN NAMBIAR AND OTHERS (A.I.R. 1995 SUPREME COURT 1852), cited supra, wherein the Supreme Court has held that the discrepancy in the evidence of the attestator will not vitiate the validity of the registered will, which was duly endorsed by the registrar. We are, therefore, of the view that the circumstances pointed out by the learned counsel for the appellant/defendant are not really suspicious circumstances creating a doubt in the mind of the Court about the execution of the will.

13. Before we conclude, we wish to quote the observations of their Lordships made in SUNA ANA ARUNACHELLAM CHETTY AND OTHERS vs. S.R. M.RAMASWAMI CHETTY (1916 INDIAN CASES (VOL.XXXV) PRIVY COUNCIL Page 1).

"When a will has once been made and is apparently in perfect form, and the evidence of the attesting witness is to be trusted, few things can be more dangerous than to attempt to recreate the kind of Will that the man ought, in the opinion of the Court, to have made and once the man's mind is free and clear and is capable of disposing of his property, the way in which it is to be disposed of rests with him, and it is not for any Court to try and discover whether a Will could not have been made more consonant either with reason or

with justice."

N. DHINAKAR, J AND
A. KULASEKARAN, J

14. On the discussion made above, we find no merits in this Original Side Appeal. The Original Side Appeal deserves to be dismissed and it is, accordingly, dismissed.

Index: Yes
Website:Yes

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To

The Sub Assistant Registrar,
Original Side, High Court,
Madras.